Supreme Court, U.S.
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No. 09-700

IN THE SUPREME COURT OF THE UNITED STATES

Homaidan Al-Turki,

Petitioner,

vs.

State of Colorado,

Respondent.

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE AND FACTS

In June 1999, Mr. Al-Turki and his wife/co-defendant brought Z.A., a 17-year old Muslim girl from a village in Indonesia, to Saudi Arabia to work for them as a domestic servant at a salary of 600 Saudi riyals (approximately $150) per month (Record 18:60-61, 71-75, 99-100, 102).

In September 2000, the Al-Turkis brought Z.A. to the U.S. (Record 18:124). She was admitted to stay until March 9, 2001, as a "personal or domestic employee." The Al-Turkis kept Z.A.'s passport but failed to renew it, while repeatedly warning her that if she left them she would be arrested (Record 21:28). They also strictly controlled her communications, disallowing her to write letters to her friends (Record 21:80; 22:49; 23:28, 132-134).

Mr. Al-Turki misrepresented Z.A.'s visa status and employment situation to his friends (Record 25:88-89, 262, 307). He also falsely told his secretary at his bookstore that Z.A. was married to a driver in Saudi Arabia (Record 25:184-85). Z.A. was instructed to say that her salary was $800 per month (Record 18:122). In August 2004, she was told that if she was contacted by authorities she should tell them that she had two days off every week, and that her salary was sent to Indonesia (Record 21:73-74, 99).

On November 18, 2004, following FBI investigations of Mr. Al-Turki, Z.A. was arrested for overstaying her permit. Mr. Al-Turki and his wife were also arrested for harboring an illegal alien. Initially, Z.A. told authorities what she had been instructed to say by the Al-Turkis regarding her employment situation. Eventually, however, she told the truth, including the fact that she had been

paid only $1500 during her entire stay in the United States.[1] She also revealed that Defendant had sexually abused her on a regular basis.

At trial, Z.A. provided a detailed account of Mr. Al-Turki's sexual misconduct. According to her, about once every two weeks, Mr. Al-Turki would go to her room in the basement at night and sexually molest her, including digitally penetrating her and forcing her to perform oral sex on him (Record 19:21-22, 26, 65, 97, 99, 102; 21:41). During the last incident of sexual abuse, which occurred approximately two weeks before Z.A.'s arrest, Mr. Al-Turki, for the first time, had sexual intercourse with Z.A., who was still a virgin (Record 21:44-46). Afterwards, Z.A. confronted Mr. Al-Turki with a blood-stained tissue, expressing fear that she would become pregnant (Record 21:45). Three days later, Mr. Al-Turki told Z.A. not to worry, that he would not have sexual intercourse with her again, and that she should tell him if she missed her period (Record 21:48). Z.A. kept a diary describing Mr. Al-Turki's sexual abuses. However, prior to Z.A.'s arrest, Mr. Al-Turki told her to destroy it, which she did (Record 21:75-76; 23:109-10).

Two married Muslim women described Mr. Al-Turki's similar acts of sexual misconduct against them, including touching their genitalia and breasts (Record 24:160-71, 180-99).

Mr. Al-Turki's theory of defense, which is repeated in his petition, was that Z.A., under pressure from the FBI and motivated by the desire

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[1] Based on minimum wage, the value of Z.A.'s services during the last three years of her work for the Al-Turkis was $96,044.92 (Env. #6, People's Exh. 87a 5162).

to get authorization to stay and work in the U.S., had fabricated the allegations (Record 18:44, 50-51, 53-55; Env. #8, Instruction 32). However, Z.A., who disclosed Mr. Al-Turki's abusive conduct to a friend of his, Mr. Al-Resheid, more than a year before any contact with authorities (Record 19:105-06),[2] never asked for assistance to stay in the U.S. (Record 25:171). Moreover, under the 2000 Trafficking and Violence Protection Act, Z.A. automatically qualified for "continued presence" status, which allowed her to stay and work in the U.S. (Record 25:119-20, 122, 125-26), and the process to establish her "continued presence" status started long before she revealed the sexual abuse (Record 25:125). Finally, the FBI agent who helped Z.A. with filling out her necessary forms signed them on April 4, 2005, three days *before* her revelation (Record Env. #7, Deft's Exhs. E, F; 25:172-88).

Mr. Al-Turki was convicted of false imprisonment, conspiracy to commit false imprisonment, felony unlawful sexual contact (12 counts), criminal extortion, and theft (Record 4: 872-99). He was sentenced to concurrent terms of 20 years to life for the unlawful sexual contacts, an eight-year consecutive term for theft, and shorter terms on the remaining charges to run concurrently with the theft sentence (Record 4:901-02; 5:1250-55; 29:73-76; Supp. Record 31-34).

On appeal, Mr. Al-Turki challenged his convictions on various grounds. In an unpublished opinion, the Colorado Court of Appeals affirmed Mr. Al-Turki's convictions. *People v. Al-Turki*, 06CA2104,

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[2] Mr. Al-Resheid, a subpoenaed witness for the prosecution, left the U.S. on August 16, 2005, and never returned (Record 20:52-54).

January 22, 2009 (Petition, App. 1a-29a). The Colorado Supreme Court denied certiorari review. *Al-Turki v. People*, 2009 WL 2916999 (Colo. No. 09SC326, September 14, 2009) (Petition App. 30a-31a).

Jury Selection Issues Raised on Appeal

In his direct appeal, petitioner raised two claims concerning jury selection, alleging that the trial court erred by (1) denying his challenges for cause to three prospective jurors, including Juror C.M., and (2) imposing an "unreasonable time limit" on *voir dire*. Deft's. C.A. Br. 20-43.

The Colorado Court of Appeals relied on the following account of the jury selection process and Juror C.M.'s relevant statements and demeanor:

> Here, before the parties' voir dire, the court required the prospective jurors to complete two questionnaires that asked the jurors' feelings on issues specifically relating to the case. For example, one question provided: "The defendant, the complaining witness, and the other witnesses in this case are Muslims from the Middle East and Indonesia. Please briefly give your reaction to that fact." Another question asked: "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons."

Petition 20a. Juror C.M. wrote "[n]one" in response to the question regarding potential ethnic or

religious biases (Record White Env. #7, Questionnaire #71).

"Juror C.M. was scheduled to go on a business trip to Mexico the following week, which could not be rearranged without some inconvenience and possible expense." Petition 12a. After C.M. was selected as a juror, defense counsel noted that he "'appear[ed] somewhat agitated' and asked the court to excuse him for cause because of hardship related to his upcoming business trip.[3] The prosecution objected, and the court denied defendant's request." *Id.* at 13a. "As the court began administering the oath to the jury, Juror C.M. interrupted," asking:

> ... if I'm more likely to believe a person of faith would commit a crime if it conflicted – *if the faith conflicted with the laws of our government.* It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion?" [sic]

Id. (Emphasis added; brackets in original). Following additional exchanges between Juror C.M. and the court, the court stated that "while it could not get into specific facts or issues that might come up in the case, based on Juror C.M.'s previous

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[3] Defense counsel described Juror C.M.'s reaction to his selection as follows: "[H]e looked as if he just woken up and realized what his plight was, and his plight was he was going to be serving on this jury." (Record 26:12).

indication that he could follow the law and base his decision on the evidence presented, he was qualified as a juror in this case. Juror C.M. then said, 'okay.'" *Id.* at 14a.[4]

Based on this record, the Colorado Court of Appeals made two factual findings in support of its decision to uphold the trial court's order denying petitioner's challenge for cause to Juror C.M.:

> ... First, prior to his selection, Juror C.M. did not evince any concerns of bias toward defendant or the Islamic religion. His questionnaire indicated that he had no reaction to the fact that people involved in the case were Muslim. Moreover, defendant expressed no concerns when the issue was raised of whether people from other cultures living in the U.S. should obey the laws of this county.
>
> Second, after his selection, Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion. ... Juror C.M. was simply asking for clarification, and was not evincing a bias against defendant or

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[4] Juror C.M.'s purely hypothetical question to the court concerning possible conflicts between Islamic laws or beliefs and state laws was not pertinent to this case, which did not present any such conflicts, particularly regarding the alleged behavior underlying sexual assault and theft, the two most serious charges brought against petitioner.

his religion that would require rehabilitation.

Id. at 15a-16a.

ARGUMENT

This Court should deny certiorari review because the question presented in the petition was neither raised nor resolved below.

Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a). Petition 1. In reviewing state court judgments under this statute, "[w]ith 'very rare exceptions,'" this Court has adhered to the rule that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" to be reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (dismissing the writ as improvidently granted because state supreme court did not expressly address the question on which certiorari was granted); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*) (same; "Mindful that this is a court of final review and not first review ... we thus decline to reach the merits of petitioner's present challenge").

This Court has also recognized that "adhering scrupulously to the customary limitations on [its] discretion regardless of the significance of the underlying issue, ... promote[s] respect ... for the Court's adjudicatory process." *Adarand Constructors, Inc.*, *supra*, at 110 (quoting *Adams*, *supra*, at 92 n. 6). *See Beck v. Washington*, 369 U.S. 541, 549-50

(1962) (petitioner's equal protection claim was not properly before this Court, as it was never properly presented to state courts); *White River Lumber Co. v. State of Arkansas ex rel. Applegate*, 279 U.S. 692, 700 (1929) (same). *See also National Collegiate Athletics Assn. v. Smith*, 525 U.S. 459, 470 (1999) (ordinarily the Court does "not decide in the first instance issues not decided below"); *Glover v. United States*, 531 U.S. 198, 205 (2001) (same); *City of Springfield Massachusetts v. Kibbe*, 480 U.S. 257 (1987) (*per curiam*) (same); *Youakim v. Miller*, 425 U.S. 231 (1976) (*per curiam*) (same). "'[I]t would be unseemly in our dual system of government,' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, *supra*, at 90 (quoting *Webb v. Webb*, 451 U.S. 493 (1981)).

Thus, under this Court's Rule 14.1(g)(i), a petitioner seeking review of a state-court judgment must specify when the federal questions sought to be reviewed were raised in state courts and "the method or manner of raising them and the way in which they were passed on by those courts; ... so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari."

The question presented by petitioner is "whether the courts below erred in refusing to allow petitioner to probe the juror for potential bias (or to dismiss the juror for cause) on the ground that the juror's comments 'did not unequivocally express actual bias.'" Petition, Question Presented. This compound question raises two completely separate issues: (1) the trial court's refusal to allow petitioner to probe a particular juror (Juror C.M.) for bias; and (2) the trial court's refusal to dismiss the same juror

for cause. Under "Reasons for Granting the Writ," however, petitioner discusses only the first issue, without arguing, or even claiming, that the Colorado Court of Appeals erred in upholding the trial court's refusal to excuse Juror C.M. for cause. The first issue, on the other hand, is not properly before this Court because it was neither raised nor resolved in petitioner's appeal.

Relying on *Ham v. South Carolina*, 409 U.S. 524 (1973), *Ristaino v. Ross*, 424 U.S. 589 (1976), *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), and *Turner v. Murray*, 476 U.S. 28 (1986), petitioner asserts that "[t]his Court repeatedly has made clear that a trial court must allow a defendant in a criminal case to probe prospective jurors for bias whenever there is a 'significant likelihood' that racial or similarly invidious prejudice might infect the juror's [sic] deliberations." Petition 10. He further asserts that in his case the trial court rejected his request to question Juror C.M., who allegedly stated that he was biased against Muslims, and that the Colorado Court of Appeals affirmed that decision by "holding that the juror's comments 'did not unequivocally express actual bias.'" *Id.* "This decision," claims petitioner, "which follows others in Colorado, so clearly and consequentially departs from the Constitution's 'significant likelihood' standard as to require this Court's intervention." *Id.*

However, petitioner's account of the Colorado Court of Appeals' holding is incorrect. In the summary of its conclusions, the court stated its holding on the two issues raised by petitioner regarding *voir dire*:

> B. The trial court did not err in denying three of defendant's challenges for cause because the three prospective jurors did not evince actual bias toward defendant.
>
> C. The trial court did not abuse its discretion in restricting the parties' voir dire of prospective jurors to forty-five minutes per party because the court conducted its own voir dire and had the jurors complete two questionnaires before imposing the time restriction.

Petition App. 2a. Under the heading of "Challenges for Cause," the court stated the question raised by petitioner as follows: "Defendant contends that the trial court erred in denying the challenges for cause he asserted based on alleged actual bias of three jurors." *Id.* at 11a. As to Juror C.M., applying the Colorado statute governing challenges for cause, Colo. Rev. Stat. § 16-10-103(1)(j), the court upheld the trial court's refusal to excuse him for cause based on its findings that (1) "prior to his selection, Juror C.M. did not evince any concerns of bias toward defendant or the Islamic religion," and (2) Juror C.M.'s comments after his selection "did not unequivocally express actual bias against defendant or his religion. *See Carrillo*, 974 P.2d at 488." *Id.* at 11a, 15a-16a. In *Carrillo v. People*, 974 P.2d 478, 488 (Colo. 1999), cited by the court, the Colorado Supreme Court held that the prospective juror's "answers to questions about his working relationship with [the victim's father who was a prosecution witness] appear ambiguous and fail to articulate a clear expression of bias *requiring his dismissal*" (emphasis added).

Thus, contrary to petitioner's repeated assertions, Petition 8-9, 13-18, the requirement of an "unequivocal expression of actual bias" stated by the Colorado Court of Appeals in petitioner's case, and the requirement of "a clear expression of bias" stated by the Colorado Supreme Court in *Carrillo*, apply to *dismissal* of a juror for cause and have nothing to do with the issue of *probing* of a juror for bias.

The only reference to the issue of additional questioning of Juror C.M. in the Colorado Court of Appeals' opinion is found in the statement that "the trial court did not abuse its discretion in denying defendant's challenge for cause and his request for extended voir dire." Petition, App. 16a. "Extended voir dire" in this context, however, refers to the court's conclusion, stated immediately before this statement, that the trial court was not required to rehabilitate Juror C.M. before denying petitioner's request to excuse him for cause: "Thus, Juror C.M. was simply asking for clarification, and was not evincing a bias against defendant or his religion that would require rehabilitation." *Id.*

In his petition for certiorari review to the Colorado Supreme Court, petitioner argued that his case raised two issues that needed to be addressed: (1) "when an expression of potential bias by a prospective juror triggers a trial court's duty to inquire further or, at the very least, permit additional questioning upon request regarding the potential bias and the juror's ability to be fair and impartial"; and (2) "this Court should clarify the appropriate standard for determining when a prospective juror's expression of actual bias warrants excusal for cause." Petition for Writ of Certiorari 7-8. Petitioner did not cite a single federal case in support of this argument, relying

instead only on Colorado cases, statutes, and rules, and one case from Utah. *Id.* at 8-19.

As the above account shows, the issue raised and addressed in petitioner's appeal was whether the trial court erred in denying petitioner's challenge for cause to Juror C.M. Whether petitioner was constitutionally entitled under *Ham* to further probe Juror C.M. for religious bias was neither raised by him nor decided by the Colorado Court of Appeals. Not a single case dealing with that issue is even cited in the opinion.

Citing isolated statements from the opening brief in his direct appeal, petitioner nevertheless asserts that he "clearly and unambiguously argued on appeal, citing *Ham*, that the trial court's refusal to allow such questioning 'denied [him] his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution.'" Petition 14 (quoting Deft's C.A. Br. 20). However, the single citation to *Ham* in petitioner's opening brief, with no discussion, was in connection with his claim of alleged "unreasonable time limit" placed on *voir dire* in general. As this Court has observed, "[t]he discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams v. Robertson*, 520 U.S. at 88 (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n. 9 (1987)).

Petitioner also claims that he made the following argument to the Colorado Court of Appeals: "'The trial court's' restrictions on *voir dire* 'violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury.'" Petition 14 (quoting Deft's C.A. Br. 40). However, the word "restrictions"

in this statement is a substitute for the phrase "unreasonable time limitation" in the original sentence appearing in petitioner's opening brief on which the above quotation is based. Moreover, the original statement appeared in the section of the opening brief discussing the trial court's alleged "unreasonable time limit" on *voir dire* in general. Deft's C.A. Br. 40.

Ham, *Ristaino*, *Rosales-Lopez*, and *Turner* stand for the proposition that the trial court unconstitutionally abuses its discretion by refusing to do *any* probing of racial and ethnic biases of jurors where "special circumstances" create a "particularly compelling need" for such an inquiry, such as when racial or ethnic biases are "inextricably bound up with the conduct of the trial." Assuming this principle is even relevant to the issue presented here – i.e., allegation of religious (anti-Muslim), rather than racial or ethnic, bias of a particular juror in a case where the defendant, the victim, and the key witnesses all belong to the same faith (Islam) – it is still inapplicable to petitioner's case because the trial court here *did* allow probing of jurors' biases by including in a case-specific juror questionnaire two questions submitted by petitioner specifically addressing ethnic and religious biases. As to the *adequacy* of the trial court's inquiry, as this Court has observed:

> ... the trial judge [is] not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. The Court in *Aldridge* was at pains to point out, in a context where

> its authority within the federal system of courts allows a good deal closer supervision than does the Fourteenth Amendment, that the trial court 'had a broad discretion as to the questions to be asked.'

Ham, supra, at 527 (quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931)).

Petitioner urges this Court's intervention on the ground that "Colorado's substitution of an 'unequivocal express[ion] of actual bias' standard for the Constitution's 'significant likelihood' causes real harm," and that "the integrity of the federal Constitution and this Court's decisions is at stake." Petition, 16-17 (brackets in original). Both claims are unfounded, as they are based on the false premise that Colorado courts have abandoned a constitutional standard.[5]

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[5] The entire argument presented in the *amicus* brief filed by the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar is based on the same false premise that "Colorado state courts, in contravention of this Court's prior pronouncements in *Ham* ... *Ristaino* ... and subsequent cases, have held that there is no entitlement to probe a prospective juror for prejudice – even invidious prejudice – absent a 'clear' or 'unequivocal' expression of bias on the part of the juror." Motion for Leave to File *Amici Curiae* Brief and Brief of the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar As *Amicus Curiae* in Support of Petition for A Writ of Certiorari 2. The *amicus* brief filed on behalf of the Kingdom of Saudi Arabia makes the vague assertion that the Colorado Court of Appeals constitutionally erred "by ruling that a juror's revelation of bias must be unequivocal throughout *voir dire*." Motion for Leave to File Brief of the Kingdom of Saudi Arabia as *Amicus Curiae* in Support of Petitioner 3.

CONCLUSION

The question presented by petitioner was neither raised nor resolved below. Nor does the Colorado Court of Appeals' opinion disregard any constitutional standard established by this Court regarding probing of jurors for racial or ethnic bias. There is simply no "compelling reason" for granting certiorari review in this case. Sup. Ct. R. 10.

Respectfully Submitted,

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